Supreme Court, U.S.
FILED
MAR 4 1999
CLERK

No. 98-1227

In The

Supreme Court of the United States

October Term, 1998

CONNIE SUE VALVERDE JONES, *et al.*,

Petitioners,

vs.

LUHR BROS., INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

H. Lee Lewis, Jr.
Counsel of Record
F. William Mahley
Griggs & Harrison, P.C.
1301 McKinney, Suite 3200
Houston, Texas 77010-3033
(713) 651-0600
(713) 651-1944 – FAX

Attorneys for Respondent Luhr Bros., Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13pp

RULE 29.6 NOTATION

Luhr Bros., Inc. has no parent corporation nor any nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ARGUMENT 2

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Amstar Corp. v. Dominos Pizza, Inc., 615 F.2d 252 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980) 9

Anderson v. Bessemer City, 470 U.S. 564 (1985) 7

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 2

Lewis v. Parish of Terrebonne, 894 F.2d 142 (5th Cir. 1990) 6

Randolph v. Laeisz, 896 F.2d 964 (5th Cir. 1990) 6

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 9

RULE OF CIVIL PROCEDURE

FED.R.CIV.P. 52(a) 10

STATEMENT OF THE CASE

Respondent Luhr Bros., Inc. accepts the statement of the case as set out in the Petition for Writ of Certiorari as a reasonably accurate (if somewhat argumentative) characterization of the nature of the case. However, other pertinent factual matters are set out in the argument below. Respondent would show that the court of appeals conducted a review of the record in this case in accordance with the applicable clearly erroneous standard and appropriately concluded with the conviction that the district court clearly erred and that the evidence conclusively established that the fault of Petitioners' vessel, the *AUDREY*, was the sole proximate cause of this maritime collision. Accordingly it reversed the district court's judgment for Petitioners and rendered judgment in favor of Respondents.

Additionally, Respondent would point out that other issues which were before the court of appeals – including issues as to Respondent's entitlement to limitation of liability, the amount of the limitation fund, and the basis and quantum of certain elements of damages awarded to Petitioners by the district court – were not decided by the court of appeals because of its conclusion that Respondent was entitled to exoneration from liability under the circumstances of this maritime collision case. None of these issues is addressed in the Petition for Writ of Certiorari, and therefore presumably would not be before the court even if certiorari were granted.

ARGUMENT

The disposition of this maritime collision case by the court of appeals had nothing to do with the scientific validity or reliability of expert testimony, nor was any issue presented in the courts below at any stage concerning the admissibility of an expert's scientific testimony or evidence, as was the issue considered by this court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Rather, the court of appeals rendered judgment for Respondent after determining from its review of the record evidence as a whole that the district court's determination of the cause of the collision was based upon fact findings which were clearly erroneous. As a brief overview of the evidence will demonstrate, there is no *Daubert* issue present in this case, and the court of appeals correctly and justly applied the "clearly erroneous" standard of review in sustaining Respondent's contention that the district court committed clear error in its findings of fact in this case.

The court of appeals held that the district court's essential finding – that the collision was caused by *THE ADMIRAL* permitting its tow to drift to starboard and strike the *AUDREY* broadside with the headlog of its starboard lead barge – was so against the evidence as to be manifestly wrong. This was not a simple issue as to the credibility of any individual witness or the effect to be given any particular aspect of the evidence. Rather, the court of appeals determined that the overwhelming weight of the evidence, testimonial and circumstantial, was that the collision occurred due to the *AUDREY* turning suddenly across the bow of the tow so that the tug and tow could not avoid the collision.

In its findings of fact, the district court not only rejected the eyewitness testimony – including that of two disinterested witnesses – that the tow never veered off its course near the center of the canal. It also ignored the post-collision physical evidence of the damage to the barges and to the *AUDREY*, which indicated that contact occurred only on the port side of the lead barge in the port string of the tow. It further ignored the uncontroverted expert testimony that the *AUDREY* could not possibly have gotten around to sink where it did, in the middle of the channel on the port side of the tow, if it had been struck broadside near the starboard edge of the canal.

Not only was there no direct evidence that *THE ADMIRAL* ever varied from its straight-ahead course down the center of the canal or at any time canted its tow to starboard, but also two independent witnesses, both licensed masters operating their own vessels in the vicinity of the incident, who had views from ahead of the tow and behind the tow respectively, testified that the tow never veered off course right up to the time of the collision. Further, one of the witnesses, who had a clear view of the scene, corroborated the testimony of the master of *THE ADMIRAL* that the *AUDREY* turned suddenly in front of *THE ADMIRAL*'s lead barges. In its findings, the district court rejected all the eyewitness testimony, characterizing one of the independent witnesses as not credible and ignoring the other entirely.

The hydrodynamic implications of a collision occurring as envisioned by the district court's findings was a subject addressed by an expert witness for Luhr Bros., Donald J. Green, a retired Coast Guard officer with fifteen

years of service in the marine safety arm of that agency, and a licensed master for vessels up to 1,600 tons. Green pointed out that if the starboard headlog of the lead barge in the starboard string of the tow had struck the *AUDREY* broadside, the *AUDREY* would have flattened out against the side of that barge. In that event, the *AUDREY* either would have been pushed aground out of the channel along with the tow, or else it would have rolled under the tow at that point. He said this was so because the pressure of the tow and the undercurrent in front of it would have the effect of pinning the *AUDREY* to the lead barge at the point of impact. Under the circumstances, there is no way the *AUDREY* could have escaped from its position at the alleged point of impact, continued across the bow of the tow, and gotten around to the middle of the channel where it sank after the collision. Green also noted that *THE ADMIRAL*'s barges would have run aground outside the channel if the tow had approached toward the right descending bank at such an angle as to collide with the *AUDREY* within twenty-to-fifty feet of the edge of the navigable channel (the location of the collision according to the testimony of Petitioners Coon and Jones). Petitioners offered no expert testimony to dispute Green's opinion on these matters. The district court's findings simply ignore this uncontroverted expert testimony.

Moreover, the district court's findings do not address the effect to be given to the physical evidence. The obvious indication of the post-collision hull damage to the vessels is that the *AUDREY* was crossing the head of the tow from starboard to port when the collision occurred. While Petitioners Coon and Jones asserted that

their boat was struck by the starboard bow corner of the starboard lead barge in *THE ADMIRAL*'s tow, they could not testify to this as a fact because admittedly they were paying no attention to and did not see the barges before the collision. As a matter of fact, however, there was no evidence of any impact or collision damage on that barge. Two marine surveyors, who conducted separate damage surveys of the barges in *THE ADMIRAL*'s tow after the incident, found damage and paint scrapings consistent with a collision with the *AUDREY* only on the *port* side of the lead barge in the *port string* of the tow.

The evidence as to the hull damage is also quite consistent with the indisputable fact that after the collision the *AUDREY* sank off the *port* side of *THE ADMIRAL*'s tow in the middle of the channel. The district court's findings do not explain logically how the *AUDREY* could have been rammed by the starboard side of the tow near the edge of the channel and thereafter sunk on the other side of the tow in the middle of the channel.

It is correct that several of the district court's fact findings were based upon the theory offered by Petitioners' expert witness, R. J. Underhill, to the effect that wind and current conditions moved the tow to starboard. and caused it to collide with the *AUDREY*. For instance, the district court found that the wheel man of *THE ADMIRAL*, Captain Coyle, "was distracted by crew members working on the deck of his boat to make up additional towing lines, and that this, combined with the flooding tide and stiff winds allowed Captain Coyle to permit *THE ADMIRAL* and tow to swing to the west side of the Sabine-Neches Ship Channel and strike the

AUDREY." [Petition, App. 32-33] Underhill testified that the wind was gusting from the southeast at about twenty knots, blowing on the forward quarter of the tow, and that the current was running at two knots coming out of Sabine Lake and up the canal, but he admitted that such wind conditions would have "not very much" effect on a six-barge flotilla loaded with tons of rock, and he offered no explanation as to how the tow's heading would be affected by the current. Two other witnesses who are licensed and experienced tug pilots (as Underhill, a marine surveyor by profession, is *not*) testified that the current had no effect on their tows at the time and place of the subject occurrence. Additionally, when asked what evidence he had that Coyle was "distracted" so as to permit his tow to drift to starboard, Underhill stated that he had nothing more to go on for this than the mere fact of the collision with the *AUDREY*. This is obviously circular reasoning in which the premises feed upon the conclusion. Although an expert may give an opinion on a particular matter within the scope of his expertise, that opinion must be preceded by facts in evidence, and it cannot be based simply on speculation or conjecture. *Lewis v. Parish of Terrebonne*, 894 F.2d 142, 146 (5th Cir. 1990); *Randolph v. Laeisz*, 896 F.2d 964, 967-968 (5th Cir. 1990).

The district court's fact findings otherwise relied solely upon the inferences to be drawn from the testimony of Petitioner Coon, the *AUDREY*'s pilot, and Petitioner Jones, who was standing next to him in the wheelhouse of their boat. In effect, the trial court's credibility choices result in the rejection, as unworthy of belief, of the testimony of every eyewitness who claimed

to have seen what happened, as well as a rejection of post-collision physical evidence, in order to construct a scenario based solely upon the insistence of Petitioners Coon and Jones that the *AUDREY* never turned in front of the tow.

As the court of appeals aptly pointed out, even crediting the testimony of Coon and Jones insofar as it goes, it could not be explained why no one aboard the *AUDREY* ever noticed any change in the relative position or proximity of the vessels at any time prior to the collision. Since at the outset the barges were no more than fifty yards off the port side of the *AUDREY*, according to the testimony of Coon and Jones, any change in the attitude of the 600-foot long tow of barges, all loaded ten-to-twelve feet high above their decks with rock, should have been readily discernable to the passengers of the relatively diminutive fishing vessel. According to their testimony, Coon and Jones both had a clear view of the barges at all times from the *AUDREY*'s wheelhouse, and Allen Jerome (the owner of the *AUDREY*) was on the open rear deck of the boat tending to the bait tanks, where he had an unobstructed view in all directions. Nonetheless no one aboard the *AUDREY* saw anything or gave any warning prior to the collision, according to the testimony of Coon and Jones. Asked why he did not see the tow coming, Coon testified: "I don't know why. I really don't know why I never seen it coming." As this court stated in *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985):

> [F]actors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself

> may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Even Underhill, in his testimony as an expert for the Petitioners, found Coon's version of the collision incredible because it founders on the look-out issue. Underhill testified that he could not imagine how the collision could have occurred if the *AUDREY* was traveling parallel to the tow in a position between the first and second barges in the string, as Coon testified. Regarding Coon's testimony as to the position of the *AUDREY*, Underhill stated: "How is he going – if he is that far behind – when that tow starts coming over him, what is he doing, sitting there twiddling his thumbs? He's keeping a lookout. He would have seen them." He stated that if the *AUDREY* was in the position that Coon testified it was, and the tow started angling over toward the *AUDREY*'s position, that should have been plainly within Coon's field of vision. In that situation, Underhill agreed that it would be almost impossible to believe that Coon would not have seen the barges closing the distance toward the *AUDREY*.

The expert testimony on this crucial point was all to the same effect. Green stated that there was no reason why it would not be apparent to the wheel man on the *AUDREY* if *THE ADMIRAL*'s tow were closing the distance between the vessels. He pointed out that if the pilot of the *AUDREY* had observed this happening, the collision could readily have been avoided, either by applying a full throttle that would have increased the forward

speed of the *AUDREY* to go ahead out of the way of the barges, or else by throttling down or stopping the *AUDREY*'s engines, thereby allowing the tow time and clearance to continue past while maintaining a safe distance from the barges. Given these immutable circumstances, it was apparent to the court of appeals that Underhill simply contrived an alternative scenario which had no support in the evidence.

Findings of fact are clearly erroneous, even when supported by some evidence, if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). It is appropriate for the court of appeals to reverse "when the result of a particular case does not reflect the truth and the right of the case." *Amstar Corp. v. Dominos Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir.), cert. denied, 449 U.S. 899 (1980). The court of appeals concluded after reviewing the evidence as a whole that the only explanation of this collision which is consistent with the physical evidence, stands to reason, and is corroborated by disinterested witnesses, is the failure of the *AUDREY* to safely and properly execute its overtaking of *THE ADMIRAL*'s tow, placing itself *in extremis* by making a sharp turn to port in an effort to cut too closely across the bow of the tow. Considering the evidence as a whole, the court of appeals stated that it was "left with the definite and firm conviction" that the district court committed clear error in finding *THE ADMIRAL* at fault in this collision. [Petition, App. 24] This conclusion was not the result of the court of appeals giving "extra weight" to the testimony of any particular witness, nor was it the result of a *de novo*

review of the evidence inconsistent with the "clearly erroneous" standard. Rather it was correct application of the clearly erroneous standard of FED.R.CIV.P. 52(a), as construed by this court.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari does not present an issue which is appropriate for review by this court, and the petition should be denied.

Respectfully submitted,

H. LEE LEWIS, JR.
Counsel of Record
F. WILLIAM MAHLEY
GRIGGS & HARRISON, P.C.
1301 McKinney, Suite 3200
Houston, Texas 77010-3033
(713) 651-0600/(713) 651-1944 – FAX

Attorneys for Respondent Luhr Bros., Inc.